EXHIBIT P
(Part One)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RYAN C. HENRY, KEVIN ANSARI, BRIAN BATDORFF, TIFFANIE BICE, CHRIS GOGOS, JENNIFER HABBO, DANIEL JENUWINE, JENNIFER MAULL, JULIE MAZOROWICZ, CHRIS McCOY, MICHAEL McLEAN, KEVIN MIRACLE, TERRY NUOTTILA, SCOTT PELLOW, VICKI PELLOW, STEVEN PRATT, PETER RABBAN, JOSEPH SANTOS, VERA SOBOLNITSKY, ANDREW TOCCO, KIMBERLY WILLIAMS, OWEN GADE, MARK SIMS, JEFFREY SMITH, ROY KRAUTHAMER, FIRAS MOUKALLED, ANTOINETTE WAS, AIMEE WELICKI, ROSLYN DORFMAN, KATIE ENNES, MICHAEL YOUNG, LISA MAROIS, STEVEN GUIDO, KRISTEN COFFEE, DANIEL KOSTKA,

Plaintiffs,

v.

QUICKEN LOANS, INCORPORATED, *a/k/a* Rock Financial Corporation, DANIEL GILBERT,

Defendants.

Case No. 04-40346

Ann Arbor, Michigan
February 11, 2008

(Hon. Paul V. Gadola)

. . . . . .

DENISA CHASTEEN, *Individually and on Behalf of All Other Similarly Situated Employees*,

Plaintiffs,

v.

Case No. 07-10558

ROCK FINANCIAL, *a Quicken Loans, Incorporated Company*, DANIEL B. GILBERT, *Personally and Individually*,

Defendants.

. . . . . .

MOTION HEARING
BEFORE THE HONORABLE STEVEN D. PEPE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	PAUL J. LUKAS RACHHANA T. SREY DONALD H. NICHOLS NICHOLS KASTER & ANDERSON 4600 IDS Center 80 South 8th Street Minneapolis, MN 55402 (612) 338-1919
For Defendants Quicken & Gilbert:	ROBERT C. VARNELL ROBERT P. DAVIS MAYER BROWN 1909 K Street, N.W. Washington, DC 20006-1101 (202) 263-3000
Court Recorder:	None present

NOT PRESENT:

Court Transcriber:	Karin Dains, CSMR/CER 4656 28741 Santa Barbara Drive Lathrup Village, MI 48076 (248) 569-9703

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

TABLE OF CONTENTS

PROCEEDINGS - Monday, February 11, 2008

Ann Arbor, Michigan

Monday, February 11, 2008

Afternoon Session

- - -

(Call to order of the court)

THE CLERK: The Court calls Case 04-40346, Henry versus Quicken Loans, and 07-10558, Chasteen versus Rock Financial.

THE COURT: Good afternoon. I would ask the attorneys for the parties to put their appearances on the record, please.

MR. LUKAS: Good afternoon, your Honor. Paul Lukas from Nichols, Kaster & Anderson. Here with me is Rachhana Srey, also from Nichols, Kaster & Anderson, and Don Nichols from Nichols, Kaster & Anderson. We are here on behalf of the plaintiffs in both cases.

THE COURT: Thank you, Mr. Lukas.

MR. VARNELL: Good afternoon, your Honor. Robert -- Robert Varnell with Mayer Brown on behalf of Defendants Quicken Loans, Inc., and Daniel B. Gilbert.

I also have my colleague Robert Davis here.

MR. DAVIS: Hello, your Honor.

THE COURT: Mr. Davis.

I think that I would like to start with the Chasteen dispute first with regard to the discovery.

THE COURT: Yes, Mr. Davis.

MR. DAVIS: Your Honor, thank you. Hopefully, this will be clear enough for the -- for the transcription.

THE COURT: Fine.

MR. DAVIS: Great. Thank you.

THE COURT: You can remain seated if you are comfortable remaining seated.

MR. DAVIS: Well, your Honor, I'm so used to coming to federal court and standing up --

THE COURT: Okay.

MR. DAVIS: -- I wouldn't know what to do sitting, so that's --

THE COURT: That's fine.

MR. DAVIS: Your -- your Honor, we have moved to compel on certain discovery matters. Plaintiffs have what is essentially a reciprocal motion for protective order.

Your Honor has been fairly thoroughly briefed on a short turn-around. I -- I've got perhaps maybe six or seven minutes of short comments, if -- if I may make those.

Your Honor, as -- as the Court has recognized in other opinions, there's a fundamental difference between a collective action under the Fair Labor Standards Act under 29 U.S.C. 216(b) and a class action under Rule 23.

In a collective action, each person who joins the case gets listed as a separate party and thus stands on their

own as a party. That is why the overwhelming majority of courts -- and we've cited them in our brief -- have held that individualized discovery lies in a Fair Labor Standards Act collective action. For example, in the American -- for example, in the Coldiron against Pizza Hut case, three hundred and six plaintiffs, they were all required to respond to discovery.

We've gone through the Royal and Sun Alliance case, the Pratt & Whitney case. I won't take up the Court's time. We -- we have briefed it, but there is a long line of cases that hold that individualized discovery, both written discovery and deposition, is really the rule in Fair Labor Standards Act cases.

THE COURT: All right.

MR. DAVIS: Yes, your Honor.

THE COURT: Before we get into this, it seems that it would be helpful to get in clear visibility what the primary factual issues it seems that this Court will have to resolve are in this case, and it seems to me that that is to determine, with respect to the plaintiffs -- and I'll use that term just in the plural at this time --

MR. DAVIS: Yes, sir.

THE COURT: -- what their job duties and tasks are and how they perform them and, to some extent, the relative proportion of time they might be doing things that would be

called sales on the individual customers or individual sales services. Is that not basically what --

MR. DAVIS: Absolutely, your Honor. Matter of fact, I think that there are a number of lines of inquiry that come out of those questions. For example, where did each plaintiff get his or her leads for people to talk to about loans? How often did each plaintiff work out of the office in meeting with potential clients or with referral sources, such as builders, realtors, closing companies?

THE COURT: And I take it that's exempt from the --

MR. DAVIS: We clearly believe --

THE COURT: -- or they are going to be exempt from sales.

MR. DAVIS: -- it is exempt, but it's -- it's -- if you will, it's a different type of exempt activity than sitting in the office and dealing with people over the telephone.

How did those mixes change for these plaintiffs over the two or three years of issue in -- in the case?

These plaintiffs collectively worked out of three different offices. Were there differences among those offices in terms of what they were told to do and how they in fact did their work?

Did each plaintiff use the company's technology the same way? Apparently some of these people would go off and

meet with clients and just take nothing fancier than a pad, gather information. Other people would put it directly into the computer system.

How much time did each plaintiff claim that he or she worked, and did that amount of time worked change for that person over a two- or three-year period?

A couple of other brief examples: If they had more than one supervisor over the recovery period, what did that supervisor say? What were the expectations of the duties?

And finally, how did the actual nature of their work change over the two- or three-year period, both due to market conditions and changes in market conditions?

So, your Honor, very much -- you've absolutely framed what the factual issue is, but we can really see it quickly proceed, in terms of each individual, what their actual claim is, what they say that their work actually was.

THE COURT: What I find confusing is David Henry, for instance, in the lack of willfulness assertions --

MR. DAVIS: Right.

THE COURT: -- seems -- now, this is obviously in the -- in the Henry case in that that involves, I understand, a different setting --

MR. DAVIS: Right.

THE COURT: -- and may therefore make substantially different nature of proofs, but it's -- in that case, he seems

to suggest that in determining whether or not these persons fell under the administrative exemption and fell within the opinion letter that I assume that the trade association for Quicken helped get written --

MR. DAVIS: Hm-hmm.

THE COURT: -- as they would properly be trying to get done, that he characterizes these individuals as basically doing the same job.

I also recall that there was an expert -- one -- or -- or one question -- questionnaire that had about twenty-five or thirty parts to it that is presently under a motion to strike with respect to the Henry case, but in that, we got all the persons in the survey indicating they did all of the same functions, so it seems to me that in one case I'm getting a defense perspective on two different issues, that these people all basically do the same job, and this job should be, almost as a matter of law, determined not to be covered by any obligations for paying overtime --

MR. DAVIS: Your Honor, I -- I -- I understand your question.

THE COURT: -- and now in this case --

MR. DAVIS: I'm sorry.

THE COURT: -- you're saying, "Oh, we've got to do individual, Judge." I -- I just don't understand do these people or do they not basically do much the same work.

MR. DAVIS: Your Honor, we think that they do basically the same thing, that they contact their clients -- potential clients, they gather information from them, they analyze that information, they evaluate it, they look at various loan products that are available, they try to match up those loan products of what best meets the needs of -- of each client. We think, at the end of the day, that this is -- is -- is a very cohesive group.

Nevertheless, unlike the Henry case where you pretty much had everybody working together on essentially a common and uniform environment, i.e., a floor with -- with cubicles and telephones, here you have people spending most of their time in the office, some people spending a fair amount of time out of the office.

Here's why we want to develop that inquiry, your Honor. You have an order on -- on the agreement, stipulation of the parties, conditionally certifying this class. Notice has gone out and has been underway now for -- for over a week -- a week and a half. We have the opportunity under the cases that this Court has -- has discussed in other contexts to come back at the end of that process when discovery is done and be able to say, "Your Honor, we move to decertify the -- the class." I'm not sure if we'll do that, your Honor. What we need to do is hear what these people say and see their responses before we can -- before we can do that, and the case

law is very specific in setting forth that process.

The end of the day, I'm going to guess that we're going to say we have one group of people here doing substantially the same thing, but until I hear what they have to say, I can't -- I can't conclude that.

THE COURT: The plaintiffs are saying, again in the Henry case, but that at one time you had uncertainty as to whether you were going to rely on advice of counsel and wanted to do a privilege screen, and now they are contending you are relying on advice of counsel, though there's some dispute on that -- we'll get to that when we get --

MR. DAVIS: Right.

THE COURT: -- to that motion --

MR. DAVIS: Right.

THE COURT: -- but that the extraordinary gymnastics we undertook to set up safeties for your client to protect privilege, they are now contended are unnecessary because of a fuller elaboration of -- of your defense strategy, which you are entitled to do, but I am just -- if the plaintiffs are willing to sort of live by what is the mean average, so to speak, of this job as opposed to having to put every bloody plaintiff and try each and every one of their job descriptions to find out which may be the outliners that may do some unusual kinds of things, maybe things they oughtn't even be doing and probably might even be advised not to do and the

supervise realized he was squandering time and might be doing something that was an inappropriate solicitation or other things -- I -- you never know what you may find out on this -- and -- and I'm also, you know, concerned about whether these cases are going to be manageable as a collective action.

I mean, if you do not have sort of this commonality -- and again, I realize that the ability to seek to decertify a conditional collective action later is a way of determining when you have an inappropriate collective action, but obviously the courts are hoping that when we have a collective action, then you will have some of the efficiencies that are not unlike a class action even though I do realize that there are differences.

MR. DAVIS: Well, your Honor, exactly that is where the motion for decertification, if one is ever made in this case, comes into play.

The cases that I have just described to you and that we've briefed, most of them come up in the context of notice having gone out, exactly where we are now -- paeople have said -- raised their hand and have said, "I want to join the case" -- and then looking hard at those people not only in the terms of merits of the case but also are they, for purposes of Section 16(b) in the Fair Labor Standards Act, similarly situated.

THE COURT: Okay.

MR. DAVIS: If they are similarly situated, then all of the efficiencies that -- that you contemplate will come into place for dispositive motions and -- and trial.

THE COURT: Isn't it anticipated -- and to put this maybe roughly -- that the members of the collective class are to be in office, primarily, mortgage brokers that have worked in three offices here in Southeastern Michigan?

MR. DAVIS: Your Honor, actually I think that that is not necessarily the case over the three-year recovery period for -- for each of these people.

Again, I'm totally uninformed about what these --

THE COURT: Who -- who would not be included?

MR. DAVIS: -- plaintiffs say.

For -- for example, I -- I think going back to late 2004, early 2005, I think there are some number of people who, at least in the putative class -- let's see if -- if they sign off -- who actually spent fair amounts of time outside the office. They would go off and meet with clients. They would go off and meet with referral services. Because of changes in market conditions, because of changes in technology, because of the increasing use and products, frankly, of the company's national advertising, you have people affirmatively calling in. he same person who may have gone out of the office in early 2005 doesn't need to go out of the office anymore. They're getting people who are calling in. They have a

computer profile where they can start to enter the information, so that's why we have this, if you will, change in circumstances which --

THE COURT: Let me ask this.

MR. DAVIS: -- we did not have in the Henry case.

THE COURT: If -- if one were to want to ultimately determine whether it's worth the effort to try and decertify the collective action, might it not be prudent to at least start with a subset of the whole to determine whether there are some in here that don't belong in here? And if that's the case, then one might infer from that that there are probably others out there that don't belong, and that -- that would then warrant maybe undertaking some further and additional discovery, particularly even if -- assuming discovery has started now, we've got sixty days before we know who all is going to be in this class. I mean, we're going to have to sequence this discovery for any number of reasons just because of the numbers of individuals involved, and if you get them out to your definition of what amounts to a representative sample, we're still going to have a healthy bunch of individuals to take discovery from --

MR. DAVIS: Correct.

THE COURT: -- but would it not be prudent to start off with trying to develop what would be a representative class if we determine that will be sufficient and see if there

is this sufficient amount of extraneous or outliners that really don't meet the model of either what would qualify for this exemption because of some unusual things they're doing or maybe shouldn't be doing.

MR. DAVIS: Your Honor, I think what the cases tell us is to look at the context. We have a number of cases where essentially everybody shows up the same place every day and does the same thing, the assembly line model, the call center model. I -- those cases essentially recognized that when you've got a group of people together doing the same thing, you don't necessarily need to look at everybody, or you can look at a much smaller number of them. Frankly,in those situations, you rarely see motions for decertification.

However, when you have a highly variegated population, particularly a population that changes over time, the person is doing something different today than what they were doing in early 2005 but, for example, it's very hard, other that using some fairly powerful statistical techniques to be comfortable that, if you will, a small group of people really sheds much light on what the larger group is actually doing. That is why we have spent a fair amount of time in our papers going through some statistical analysis to say that if a statistical approach is used, one must use it very carefully and really abide by those statistical imitations, particularly when you have a population which is a relatively -- yeah --

small sample. You're not polling all of the people of Michigan. You know, you're polling -- if you will, "polling" in the statistical sense; we're pulling from -- I think our notice went to seven hundred and roughly fifty people. I don't know how many people will come into this case, but we're certainly talking about numbers that are much, much lower than, if you will, the assembly line cases.

THE COURT: Is there not a date now of 2004 or whatever at which time, because the defendant did the advertising to bring the customers -- that is, they were sort of the rainmakers, more so than the individual employees being able to get prospective customers -- and a time when, because of the need to have access to computers to run these various tests to see if they're suitable for this loan or that loan, which are sort of office-based -- did there not come a time when the major predominate traffic was through these offices, not out in the field?

MR. DAVIS: Your Honor, I think I can say that as to the work force as a whole, but we're not looking at the work force as a whole here. We're looking at a self-selecting group who are going to decide whether to join this case.

If we were litigating a 23(a), 23(b)(3) class action, there would be a great debate over who's truly representative of -- of the absent plaintiffs. Here we have a finite population who raise their hand and say, "I want to get

in the case."

THE COURT: There would be that -- that we want to find out who maybe doesn't belong in this group, and my bet is the plaintiffs probably want to find out who doesn't belong in this group for fear that you might somehow use them to try and defeat those that they claim ought to go on the group list.

Again, what would be the harm of starting off with a representative sample, and then possibly finding out who else doesn't belong could then be done at least with written discovery and wouldn't necessitate depositions once one has refined exactly kind of what are the specific differences, and how would one get an answer to whether this person did or didn't do that by a written question format, and again, we're not dealing with unsophisticated farmers that can't read.

MR. DAVIS: Your Honor, two responses to that. First of all, we -- we do not have -- and I understand exactly the Court's inquiry, and I'm not trying to -- to be obdurate about this; I'm trying to look carefully at what is -- is a changing state of factual circumstances over the two or three years at issue.

I assume that there's clearly a group, for example, in 2006 that spent most, if not all, of their time in the office, frankly working very much like the -- like the web mortgage bankers that you've heard about in the Henry case. These leads are being developed by other people. They're

being sent to those -- to those mortgage bankers and essentially dealing with those people over the Internet by e-mail and by telephone, much as they do in -- in -- in Henry. We could probably figure out who those people are.

Now comes -- now comes, if you will, the -- the -- the twist to it. Those people may have -- some appreciable number of them may have spent the first part of their working time at the company spending more time out of the office, calling on realtors, calling on developers, if you will, marketing or promoting the Quicken Loans-slack-Rock Financial name. I have a very hard time, as -- as -- as a result, for it saying -- well, I'm going to pick on Mr. Varnell here -- that -- that Mr. Varnell in his 2006 incarnation is representative, but that doesn't bear on his claims back in, you know, early -- early 2005. That's why we think that if there need to be limits put here, that using hypergeometric distribution is -- and -- and well-established theories of statistical selection is the best way to level through all of those changes over the period.

We have a pool of people. We pool them in a statistically significant level, and we -- we will live and have to live with the -- with the results, because it is a finite set sampled without replacement, and that's who it is.

THE COURT: Let me ask if -- you may not be finished with your presentation, but on this point, why don't we ask

Mr. Lukas to respond?

Did you file a reply brief -- if so, I didn't read it -- to the issue of this -- their definition of what would be a statistically significant number?

You did not. Okay. I thought I missed something, and I was going to apologize if that's the case, but if not, you have time now to answer, one, on this difference between the Henry case that Mr. Davis has outlined and, secondly, whether or not you believe there's a method to determine a representative class short of deposing everybody in discovery -- everybody with written discovery as well as depositions.

MR. LUKAS: Thank you, your Honor.

You know, we struggled with this, actually, because it was sort of -- our main concern is that discovery is a two-way street, so to us it's, like, well, if it's everybody, fine; then they can't come back and argue burdensomeness because they have to produce documents and they have to answer discovery that's specific to two hundred or two hundred and fifty individuals. That's our first concern, is that it's a two-way street.

But we are constrained by what makes sense, and -- and I think it's that constraint that brought us to this -- to the request for representative discovery. We were tempted to say, "Fine. If it's a two-way street, we'll go one-on-one-on-one-on-one-on-one."

In Henry, they could have taken as many depos as they wanted. There wasn't any kind of constraint on representative of whatever. In Henry, they took eight depositions out of -- what? -- we have four hundred and something plaintiffs.

So in a way, we're tempted to say, "Fine, you pick your poison," in a way, but that's sort of cynical, too, because it's not really looking at what makes sense, and what we think makes sense is pretty obvious, and it seemed that -- in our previous conversations, that it seemed that the Court thought that representative makes sense.

I think there's a really good quote in that Caribou [ph. spelling] case that we cite. It's from Minneapolis. It's Judge Schiltz [ph. spelling], who's denying a decert' motion on a FLSA **Caribou** case, and he says, you know, he finds it hard to hear defendants argue about how they need to try these cases one-by-one-by-one-by-one when they felt perfectly comfortable classifying them all as exempt as a group, and that's kind of where we're at here. They -- they seem perfectly comfortable waving a wand over this group and saying, "You're exempt because you're outside salespeople," but then they come in here and talk about discovery, and they're going to come in here maybe and talk about decert' and say, "Well, we've got to go person-to-person-to-person-to-person," and that doesn't make any sense.

I mean, I don't know a thing about a hypogeometric distribution, but I do know that they're applying the wrong standard to representative testimony in an FLSA case. It's not scientific certainty of any kind. It's what makes sense.

We cited the cases. There are plenty of cases that talk about going through each individual plaintiff, having them answer interrogatories, requests for production, and -- and on the other hand, Plaintiffs sending requests on an individual basis, making them answer stuff on an individual basis doesn't make sense, and there is no -- the -- the standard isn't scientific certainty in discovery, and you're absolutely right, we take a cross-section of some kind, of somehow. It's not rocket science. It's not hypogeometric, whatever. We do something that makes sense.

THE COURT: He cites a Federal Judicial Center authority for it, so --

MR. LUKAS: Well -- well, your Honor, the point is it's what makes sense, and we can figure it out, and we have eighty people -- eighty-some people signed up right now.

You know, I've got -- I've got to tell you, if you sat through any of these depositions and you're a -- and you're a judge, you'd be -- you'd be screaming "similarly situated" after about five of these babies.

THE COURT: One of the few benefits of being a judge is not having to. It's bad enough to read selected portions

of them.

MR. LUKAS: I -- yeah, I hear you.

So, I mean, that's --

THE COURT: That and reading SEC security statements. That was the another thing a lot of my classmates have spent a lot of money earning a lot of money doing.

MR. LUKAS: Yeah. No, thanks.

But -- and, you know, we can -- we can figure out -- it -- it's not a scientific certainty and all. We don't have to be running a statistical analysis to figure out what a representative sample is, and if -- if we run -- if we do the discovery this way and we come to decertification and Defendant actually wants to bring a decertification motion, which in this case you're talking about three locations, you know, we call that decert' motion sort of a, "Be careful what you wish for," motion. Does Defendant really want to try one after another after another after another? It's sort of silly.

You know, those decert' cases are cases where you have a thousand plaintiffs all across the country. We've got these people sitting right here, and even under a Rule 42 analysis, as far as consolidation or separation, the judge is going to want to try these things together, so we just think it makes sense -- they're talking about representative and Henry over and over and over again. This case isn't any

different. They could have made the same arguments in Henry they're making here, which is, "Well, if you really drill down," you know, "these people were selling" -- you know, "these people were selling less at different points in time," or whatever. I mean, you could drill down as deep as you want.

So I guess our number one goal is a two-way street. And we want you to remember this: If you grant their motion, deny our motion, and we go marching ahead on a one-by-one-by-one basis, within six months to a year from now when Defendant is back here screaming about burdensomeness, I want you to remember why we went down this road, because what's happening to us and what happened to us in Henry is happening in this case, is it's whatever we say, they want the opposite, and it's this flip-flop thing, and I'm telling you what they're asking for right here doesn't make a lot of sense. We'll do it. It doesn't make a lot of sense, but we'll do it as long as it's a two-way street, and if they're going to do individual discovery, so are we, but that doesn't make sense, and we can pick a representative sample very easily, and we don't need scientists or doctors or experts to do it.

MR. DAVIS: Your Honor, I --

THE COURT: Mr. Davis.

MR. DAVIS: -- we -- we hear a lot about how to pick a representative sample. I -- I do note that -- Mr. Lukas'

statement of a moment ago, that they are prepared to proceed under an individualized basis. That may end this -- may end this debate, at least between the parties.

But assuming that that's not exactly what he intended, the point of the papers that we put in is that to say "a representative sample" and to say nothing more doesn't inform the Court. Well, we have focused specifically on the Smith against Lowes Home Center case, one of the cases that they came forward and told the Court about.

THE COURT: And that had fifteen hundred class --

MR. DAVIS: It -- it -- it -- it did, and we went back, and -- and the documents are very clear on -- on Pacer. We had a very quick turnaround briefing schedule. We can supply those within twenty-four hours from this hearing if you would like to see them, but Plaintiffs' counsel put in a statistical expert and said, "All right, let's draw a hypergeometric distribution. Let's draw something at -- at -- at a ninety-five percent confidence level, and here's the number."

Now, Judge King in that case concluded that that was actually too plaintiff-friendly, that there should be more depositions than -- than that. The case ultimately was transferred to another district and settled as part of a global settlement with a whole series of cases.

Our proposal is -- if we cannot persuade the Court

or take Mr. Lukas' point to proceed solely on the basis of individualized discovery, is to do exactly what Judge King did in the Lowes Home Center case, which is have a sample drawn at ninety-five -- have a sample drawn at ninety-five percent. That's the number. Those people are selected at random, and those will be the people who will be deposed and will respond to discovery.

We -- we would like to add to that we get to pick ten extra people; they get to designate ten other people. If they have Quicken Loans documents and recordings, including unauthenticated recordings, we'd like to know about those before trial, but the core of -- of our proposal is exactly congruent with -- with what Judge King did in the -- in the Lowes Home Center case which Plaintiff argued to you.

THE COURT: Mr. Lukas?

MR. LUKAS: With a sample this small --

THE COURT: I mean, the defendants are saying --

MR. LUKAS: Sure.

THE COURT: -- one, they've got precedent of where this has worked; secondly, they have a secondary authority as to the method of picking a reliable, statistically significant sample that will have some competence level if the Court can -- feels worth the -- is worth the candle, so to speak.

MR. LUKAS: The two people to my right do know what hypogeometric distribution is --

THE COURT: Great.

MR. LUKAS: -- and they tell me that a ninety-five percent scientific certainty means a hundred and fifty-two out of two hundred plaintiffs. Then they're talking about adding ten on each side. That's a hundred and seventy-two people out of two hundred plaintiffs. What's the point? Let's just do the two hundred plaintiffs. You know, I -- when you're talking about scientific certainty applied to this small of a group, it's a wash. You -- you may as well just do the whole group.

And they talk about "have to take depos" and all that. I'd be surprised if they --

THE COURT: I think Mr. Davis says that if you're accepting that as your option, that they will go with that, and I take it they also realize that -- that you're going to attack the minute they say this is burdensome with regard to your discovery.

MR. LUKAS: Well, what -- I mean -- I mean, what's the point: a hundred and fifty-two out of two hundred? What's the point? How is that -- how is that representative of anything? That's representative of a hundred and fifty-two people. Let's go the extra mile, go the extra forty-eight folks or whatever it's going to be.

I mean, I guess, you know -- you know, that's -- you know, we'll go -- we'll go person by person. That's fine.

We'll go person by person. They'll -- and we'll see how many depos they actually take. We'll see what they actually do. We'll see what they actually answer. We'll go person by person if that's what they want to do.

THE COURT: Mr. Davis?

MR. DAVIS: Thank you, your Honor. We will.

THE COURT: Okay. Is that going to resolve all the issues, then, or are there other --

MR. LUKAS: I believe that was it on Chasteen.

MR. DAVIS: Your Honor, I believe that -- that -- that takes care of it.

THE COURT: So we may now turn with greater attention to David Carroll.

MR. LUKAS: I'm going to remain seated if that's okay, your Honor.

THE COURT: Surely.

MR. LUKAS: Do you prefer to hear the motion to compel first?

THE COURT: Yes.

MR. LUKAS: Okay, your Honor.

As I'm sure your Honor is aware, what we're talking about is willful and liquidated, and I want to talk briefly about the impact that willful and liquidated has on a case.

Willful -- if the plaintiffs prevail on willful and the plaintiffs receive the full doubling of liquidated

damages, you're talking about double or tripling the damages in the case, okay? And as your Honor also notes, the standard for both of those, willful and liquidated, is a good faith and -- basically, it's good faith and reasonableness, both objective and subjective reasonableness.

We found in one of your cases in a patent case, the KMU v. Bing Lear case, you've been down this road of privilege waiver a lot further than we have. In fact, I --

THE COURT: Only in patent law. I'm finding a lot of my judicial colleagues around the country disagreed with me. At least they were -- or they were the primary authors, I was happy to see: Wayne Brazil [ph. spelling] --

MR. LUKAS: But I think that line of cases is instructive, your Honor, in that you can't -- I mean, they all agree you can't manipulate the privilege to release only favorable information. I think we all -- I think they all agree on that, and there's a -- and we cited the FLSA cases that say the same thing, you can't, and -- and that's what we have here, is the classic -- it's almost passe to say it -- the sword and shield, and that's not ground-breaking law or new to anybody in the courtroom or probably anybody in a law school. You can't do it.

And let's talk -- and that's what they've done here, and let's talk about the shield.

The shield is their assertion of the privilege

starting in September of 2004, three and a half years ago, coming up on four years. Interrogatory Number Six is a great example. His -- this is a direct quote, Defendants responding, telling us why they're not going to answer our requests regarding good faith and reasonableness, and they say:

> "Defendant sought and received attorney advice on the classification of loan consultants, but it is not prepared at this point to waive the attorney-client privilege."

And they did the same thing in their document requests. They said, "We're not waiving privilege; we're not giving you anything," and guess what, Judge? Guess what they gave us relating to classification decisions: nothing, not one document, not one Post-It note that has anything to do with the classification decision. For three and a half years, as we sit here today, we don't have anything, and the reason we don't is because they asserted the privilege and we respected that.

Now, I know they come back and say somehow we should have challenged it when they asserted the privilege, but there's no challenge. We respected their assertion of the privilege, as we are required to do, and they have asserted the privilege, and they gave us no documents.

Then we went through this whole process in the

summer of '07 with you, your Honor, with this e-mail screening. So not only do they not produce documents, they went even further and tried to protect even more because they're asserting the privilege, and they have consistently asserted the privilege throughout.

They include Mr. Carroll on their list of legal personnel in their legal department, his entire e-mail box wiped out, any e-mail that has his name on it wiped out, and, something we'll talk about in the next motion, any e-mail that said "David" was wiped out. We believe that screening process prevented us from receiving more than ninety-five percent of the e-mails. We think it wasn't a screen; it was a full-blown blockade. We believe over ninety-five percent of the e-mails were screened.

So they not only -- the shield here is not only asserting the privilege and not producing documents, it's making us go around and around, as we did with this e-mail, screening David Carroll and every document that had anything to do with anything, and that's the part that, frankly, has got us a little excited.

Now let's talk about the sword. So that's the shield, and the irony of this -- of -- the irony of the timing -- I don't know if the judge picked up on the timing, but we received the ninety-four-thousand-dollar invoice or ninety-one-thousand-dollar invoice from Mr. Lannerman [ph.

spelling] three days before they filed their summary judgment motion basically waiving the privilege. They filed their motion for summary judgment on willful and liquidated, taking the position that not -- there's such reasonableness here and such good faith here, there's not even a genuine issue of material fact, and then they say, "Ha-ha, Plaintiffs can't show otherwise." I think we can, but to the extent we can't, maybe it's because they asserted the privilege, and we haven't seen one document to support the claims they're now making.

Mr. Carroll puts in a very detailed declaration. I would call it more of a brief than a declaration, but it's called a declaration, and he talks -- he describes four years of analysis, consultation, communication regarding cases, regulations, Department of Labor opinion letters, Mortgage Bankers Association requests. He flat out says four times in the declaration he consulted with the legal department. He says he consulted with H.R. He consulted -- the expert report, which we also find ironic because they couldn't give us a draft of the report, apparently he has one or had one at some point -- they -- he talked to contacts in the industry. He did all these things.

Supporting documents produced to Plaintiff in discovery regarding this -- I think we were calling it a -- a road map --

(Unintelligible dialogue, apparently between Court &

clerk)

THE COURT: Excuse me. Go ahead.

MR. LUKAS: But what documents do we have in support of this road map? None. And the reason we have none is because they asserted the privilege.

And here comes Mr. Carroll. We don't have documents. We don't have any testimony challenging any of this stuff either, and the reason we don't is Mr. Carroll and Defendant is -- now it's a sword. Now, "Ha-ha, Plaintiffs can't prove otherwise; we -- we had good faith," and the reason we can't is because they asserted the privilege.

Now, Defendants come back in their brief and they say, "Well" -- it's kind of a "gotcha" argument -- they go, "Oh, Plaintiffs misunderstood. Mr. Carroll is a client, not a lawyer." He's a client, not a lawyer, so I guess the thought is Plaintiffs' remedy is to bring a motion to compel, but it's too late for that, so they assert the privilege for a non-lawyer, apparently, and give us nothing.

Here's the problem with that argument. His status as a lawyer or a client makes no difference to the analysis, and I'm sure your Honor is already on this, but I'm going to explain why. If he's a client -- if he's a client, then they have no grounds for the privilege that they -- they invoked back in 2004. They have no grounds for withholding all the documents supporting this road map, no grounds for it

whatsoever, and that's what they've done, withhold all that stuff.

And with respect to --

THE COURT: You mean putting his name as a screening device.

MR. LUKAS: Exactly. Well, that's one thing, and -- that's one thing. That's the e-mail. That's just the e-mail. All the other documents, summaries, communications with the NBA, the DOL, and so on, all that stuff, we didn't get any of that stuff. So if he's a client, they have no basis for not giving us any of that stuff. They have no basis for the privilege that they cited. If he's a lawyer, they've now waived it by that lawyer putting in that dec', so either -- you call them what you want. It's a red herring. It doesn't matter if he's a client or a lawyer. They -- they still -- if he's a client, they had no basis to withhold the stuff, and he's a client who in the dec' says he consulted with Legal, which is a waiver; and if he's a lawyer, he's obviously waived it. There's no argument. That's why they argue he's a client, because if he's a lawyer, he's obviously waived it by putting in this dec'.

And this is -- you know, this is, especially after that e-mail stuff, and I know we went around and around on that, the part that -- that really fried us when we read that summary judgment motion because they wait for discovery to --

they assert a privilege that rides through the entire discovery period; they let it pass.

We go even further with the screening of the e-mails, all this hullabaloo, ninety-some thousand bucks to screen, and then they bring a motion for summary judgment waiving the same privilege that they used as a shield, and that's exactly what happened here, and that's why we brought the motion, and that's why we're asking for all documents related to this road map, to this declaration, and if you read his declaration, you can almost go line by line, and they're all communications with all of these people, all of these places, all these things he claims he's done. We get that, e-mail or non-e-mail both.

That would include his e-mail box -- David Carroll's e-mail box, which was completely wiped out by putting him on the list of lawyers in the legal department when we did this whole e-mail system. That's one thing we're asking for.

We're asking that we get -- that they assume the cost of that screening, and this kind of goes over to the other motion, but this is more inclusive than the other motion. The other motion is only asking for them to pay pieces. In this motion, we're saying, because they waived the privilege and they used the privilege as a shield and ran us through the paces that they ran us through, they should have to pay for that.

When Mr. Lannerman billed us for the conversion to put this stuff in a readable format -- it was, like, fifteen thousand bucks or whatever -- we immediately paid that invoice, and we -- and -- and we have no problem paying that invoice, but everything else that happened after that was for screening for privilege when they turned around and waived most of it a couple days later. That's the really frustrating part.

But we should get David Carroll's e-mail box. We think we should get all the screened e-mails. We think we should get additional month of e-mail, which the Court and us had talked about previously. We want August of 2004, we want it at Defendant's expense, and we want no screening.

All of these things --

THE COURT: Why has that other month been held off until now, because that -- I thought that was always available.

MR. LUKAS: Well, I don't know if it --

THE COURT: It's on a showing that it was -- you know, that you were getting --

MR. LUKAS: No. You're right. That -- that -- that's -- we brought it into this motion because we had talked about it before. When we're talking about the e-mail, we bring it up. It's not necessarily related to this motion, but we want that.

But what -- what is related to this motion is there's no screening on that group, and there's -- and they pay for the production of that -- of that month as -- as a sanction for what they've done here, and I think it's -- that's our position, your Honor.

David Carroll, lawyer, or David Carroll, client, we were run through paces we shouldn't have been run through, and now we get documents and now we get e-mails that were withheld from us throughout the litigation.

THE COURT: Mr. Varnell?

MR. VARNELL: Thank you, your Honor.

Let me make a couple intro' points. One, I think Plaintiffs' motion to compel is all over the map. In a lot of ways, it's a rehash of the opposition brief that -- that they filed last fall in response to our summary judgment motion on -- on good faith and -- and lack of willfulness.

In other ways, as Mr. Lukas points out, it sort of bleeds over into the -- the other pending motion they have to transfer Mr. Lannerman's costs. But either way you look at it, their motion is both procedurally and substantively deficient.

I'd like to at least point out the -- the procedural problem here, and -- and we do address it in our brief, and that's that this motion that they filed just -- I don't know -- a month ago is in a sense in sum and substance a surreply

to the summary judgment motion on -- on good faith and lack of willfulness that we filed all the way back in the -- in the fall.

When you look at this brief, they're not even shy about it. Pages eight through ten cite directly to our reply brief filed back in November in support of our summary judgment brief. They cite directly to it numerous times. They answer that head on. In a sense, it's the fourth installment, and as I'm sure the -- the -- the Court knows. Local Rule 7.1 looks disfavorably upon surreplies unless there's -- there's some showing of good cause. They -- they didn't file a motion asking to do this, and they may say, well, that this -- this motion is -- is bound up in -- in this other issue that they've got floating out there about Mr. -- Mr. Lannerman and the e-mails, but the bottom line is several pages of this brief are devoted to answering our reply brief back in the fall, and I think that -- that should mean something, that it should count for something, and I respect the fact that --

THE COURT: Okay.

MR. VARNELL: -- you're in charge --

THE COURT: But we've also got --

MR. VARNELL: -- you're in charge of the procedure.

THE COURT: We've also got Rule 56(f), and they're claiming that they're entitled now to the additional discovery

to meet your summary judgment motion because these documents were withheld under an argument that they respected because they thought it was being asserted in good faith that they contend now has been basically eviscerated.

MR. VARNELL: I -- I understand that point, your Honor, and I respect it. I just -- I point out the -- the procedural problem here because I think it -- it does go directly to what -- what Rule 7.1 is all about, and I'll -- I'll leave it at that.

THE COURT: Okay.

MR. VARNELL: But if -- if I could, I'd like to -- to turn to the -- to the merits.

THE COURT: Turn -- turn to the more complicated issue of the merits of the use of an attorney to be the ultimate repository of decision-making authority for a corporation to be able to maybe have your cake and eat it, too, with regard to attorney-client privilege, and if this transfers into the patent solution, you may have a solution to the conundrum I was addressing in my -- in my Bing Lear case.

MR. VARNELL: I won't -- I won't have any -- I won't have any claim to -- to solving that case for your Honor, but one thing I can tell you. The --

THE COURT: At least you know to say so you've waived attorney-client privilege with respect to your communications with your client because the -- a right in

light of advice of counsel is being asserted, but is advice of counsel being asserted?

MR. VARNELL: The -- the -- the consultations that David Carroll had in regards to how to classify mortgage bankers were -- were privileged, and he has not asserted any confidential communications, and he did not, in filing that declaration or in being deposed back in February of 2005, do that within the role of -- of a lawyer for Quicken Loans.

The law is clear and we cite authority that a lawyer can be a client, that a lawyer can essentially wear two hats. I draw the Court's attention to a couple of cases, Meade [ph. spelling] Data Central v. U.S. Department of Air Force and In re Grand Jury Proceedings, that make that clear, that a -- that a lawyer can also be a client, and it's clear in this regard that David Carroll is -- he was never -- he was never giving the advice of an attorney; he was -- he was receiving the legal advice. He was -- he was acting as the client. He was also acting as the decision-maker, and all the sworn testimony in this case makes that clear, and I'd like to -- to bring a couple of cites to the Court's attention.

His deposition which Mr. Lukas took of David Carroll three years ago, all the way -- almost three years ago to the day, as a matter of fact, your Honor, back in February of 2005 -- on page sixty-three of that deposition Mr. Carroll, in direct response to -- to a question asked by Mr. Lukas, said:

"Richard Chyette" [ph. spelling] -- and he's the corporate counsel for Quicken Loans --

"would advise me of various happenings in the law."

Later on in that deposition at page one-oh-three Mr. Carroll testified:

"I would consult with him,"

meaning Richard Chyette, his lawyer, the corporate counsel for Quicken Loans.

THE COURT: That's C-h-y-e-t-t-e?

MR. VARNELL: C-h-y-e-t-t-e, your Honor, correct.

"I would consult with him,"

meaning Mr. -- Mr. Chyette --

"and he'd continually provide me updates on the law, but ultimately I made the decision."

Again, at deposition sworn testimony, Mr. Lukas asking those questions, Mr. Carroll made clear that he -- he was not the lawyer giving that advice; he was turning to Mr. Chyette, his lawyer, and getting that advice from him so that he could make an informed decision on how to -- how to classify mortgage bankers and -- and, when he would return to that issue about whether or not bankers are -- were classified properly, he would -- he would consult with his attorney in doing so.

Also, the -- the sworn declaration that -- that Mr. Carroll submitted in -- back in the fall, that also makes

clear that he was the decision-maker and not the advising lawyer, and again I just -- a few cites for -- for the Court's attention. Paragraph twelve, Mr. Carroll says:

"It was my decision to maintain the classification."

At paragraph fifteen, he says:

"I led the company's evaluation."

And again, at paragraph twenty-four, he says:

"I determined in good faith that Quicken Loans' mortgage banker satisfied the exemption."

Again, all the sworn testimony in this case, whether it was deposition or -- or declaration, makes clear that -- that Mr. Carroll was -- was -- was the client in this relationship, he would turn to Mr. Chyette for -- for legal advice and legal counsel, and he was the decision-maker on how to -- how to -- what -- what decision to come to in terms of how to -- how to classify mortgage bankers.

And, your Honor, if I could talk for a minute, leaving -- leaving the issue of whether or not the -- the -- the conversations were -- were privileged and what -- what role Mr. Carroll had in that -- that relationship with Mr. Chyette, I think it's clear that there's been no waiver. David Carroll never explicitly waived -- waived the privilege. As the client, again, as I'm sure the Court knows, he holds the privilege and he didn't explicitly waive it.

THE COURT: Well, in the spring when we were talking

about screening, that -- and again, I was somewhat amazed that the plaintiffs were willing to do it, but in order to move forward, they were willing to make a number of concessions, and I understood there . . . [unintelligible; voice fades] . . . make practical concessions in order to get access to the e-mails at that time, but then I felt that the -- one of the things we were going to screen for and they weren't going to squawk is if any attorney got cc'd, we'd assume that was for -- for legal advice from that attorney, and Carroll was put on that list, and that would have implied to me that he was an attorney that gave legal advice and therefore we were going to screen him out entirely, empty his mailbox, basically. Why is it that he should not have been -- been at least an individual which you were actually reading all his correspondence to determine whether this was his as ultimate repository of decision-making authority on whether these people were properly categorized and -- and therefore exempt from overtime, that -- that it might have been his stuff wasn't being read as to whether this actually was privileged, the communication with Chyette or other legal advice, or whether it was something that was not privileged, such as his getting information from H.R. as to exactly what these job functions were, so that they might have at least gotten all of that, and they might have found some information that suggested that there was more telephone sales activities than was being

otherwise represented or something else of that sort?

MR. VARNELL: I think I can answer that.

THE COURT: I mean, I think that's what the plaintiffs are complaining about, is you -- you got the advantage of tossing all of his e-mails as if he were one of these attorneys that we're going -- "No questions asked; you can just completely block us from them; we're not going to try to screen as to, you know, whether someone was copied that -- that wasn't -- didn't -- didn't need to get this for the giving or implementation of legal advice or this was just copying him for information purposes and had nothing to do with any legal inquiry" --

MR. VARNELL: Let me --

THE COURT: -- because that was a very, very generous protection for everyone who got put in that category, and I was assuming that people who were getting put in that category were attorneys giving legal advice.

MR. VARNELL: And, your Honor, I -- I can address that point directly, and again it goes back to a point that I at least touched on, which is that Mr. Carroll at the company wears two hats at times, and that's not something we've been cute about, and that's not something that we've been indirect about.

At pages five and six of his deposition taken, again, back in February 2005, up front, pages five and six, he

testified that some of his duties are -- are legal in nature, and some are non-legal. He noted that he's involved in -- in the drafting and review of loan documents. He also said that he's involved in mortgage-related documents and issues. He also pointed out and informed Mr. Lukas that he's the overseer of the company's client relations -- relations team, and with that -- and within that regard, he's -- he's in charge of providing advice and -- and strategy as to how to handle customer complaints. If -- if customer lawsuits are originated, he's involved in handling those and strategizing how to defend against those.

If there are complaints that come in from the Better Business Bureau or from state regulatory agencies -- again, and his role is overseeing the client relations -- relations team -- he gives advice and strategy as to how to handle those kinds of regulatory actions.

He was up front about that. He -- he -- he let Plaintiffs' counsel know that -- that at times he does act like a lawyer, and you're exactly right, Lawyer -- your Honor, the -- the -- the deal that was struck over e-mails was generous, but it was also clear and it was -- it was well defined that we were going to put all lawyers within the company or lawyers that the company relies upon on that list, and for those reasons, David Carroll was put on that list, and there was -- there was direct discussion at -- at the hearing

back on April 17th that it was going to be an automated process, that we weren't then going to do a -- a manual or an in camera review of -- of David Carroll's e-mails.

To use Mr. Lukas' memorable phrase, all e-mails containing -- containing an attorney's name would go, quote/unquote, right in the dumper, and so we put David Carroll's name on that list.

THE COURT: But that way they had no idea that this was the individual that was going play this dual role. I mean, I guess his deposition had been taken, but it was taken as a corporate representative, wasn't it?

MR. VARNELL: No, it was not.

THE COURT: It was not taken --

MR. LUKAS: Yes, it was. It was a 30(b)(6).

THE COURT: I thought it was a --

MR. VARNELL: Jay -- Jay Farner was put forward as our 30(b)(6) witness.

MR. LUKAS: He was part -- he was part 30(b)(6), too.

THE COURT: Okay. I got that from a submission of the plaintiffs' attorneys, but --

MR. VARNELL: But it --

THE COURT: -- how is it they should have known he was going to play this -- this dual role, in which case they clearly would have said, "Okay, if -- if he does attorney-

client privilege for certain things, fine, you -- you can screen those, but at least with respect to Carroll's e-mail box, you're going to have to do a visual lawyer screening old-fashioned, flat-world way. You can't just -- we're -- we're not going to give you the benefit of the doubt like with all the other attorneys to him, because if he is the ultimate decision-maker on this issue and they are claiming he made his decision in good faith and his -- if there was a violation, it wasn't willful, we are at least entitled to all communications that Carroll had with anybody that was not a lawyer, that -- that was factored into his decision-making basis," because none of those are privileged.

MR. VARNELL: Your Honor, if I -- if I could, this probably would be the appropriate time to -- if I can approach the bench, I've got a couple of exhibits that I'd like to share with the Court which I think go to this -- this exact issue.

THE COURT: Okay.

MR. VARNELL: Again, your Honor, David -- David Carroll was clear at his deposition about what his roles, both non and -- legal and non-legal, were at the company. We struck the agreement as to e-mails. We -- couple -- couple points on -- on the protocol, one more obvious than the other.

We shared the list of -- of those individuals back

on July 14th with -- or, excuse me, July 10th with Plaintiffs' counsel as to who was going to be included on that list. They saw David Carroll's name there, and they raised no issue to that whatsoever.

One -- one other point, and it sort of goes to the -- the issue of the remedies that Mr. Lukas is seeking. He says that we need to essentially reconstruct David Carroll's e-mail box and include that and that because he was -- his e-mail box was screened out entirely -- David -- David Carroll wasn't -- wasn't even on the -- the manager's list in terms of those -- those managers that -- that we put e-mail boxes together for working for Mr. Lannerman, so that's just something that I think needs to be cleared up for the record.

But in any event, your Honor --

THE COURT: So there was never even an initial screen to try and find his e-mail --

MR. VARNELL: That -- that's correct.

THE COURT: -- what e-mail was in and out of his box.

MR. VARNELL: That -- that's correct. I'm looking at what is Exhibit Three to July 10th letter, and that lists the -- the QL leaders, and David Carroll is not on that list, your Honor.

THE COURT: It's Exhibit Three to what?

MR. VARNELL: It -- it's the July 10th letter that

we sent to Mr. Lannerman to get him started.

THE COURT: Where is that in what I have, if you know?

MR. VARNELL: If you look at our opposition brief to -- to the Lannerman motion, your Honor, that would be Exhibit C is one place where it can be found, your Honor.

MR. LUKAS: It's also Plaintiffs' Three, if that helps you, Judge -- Plaintiffs' Exhibit Three.

THE COURT: Okay. And it was -- what request number was it -- request for production number?

MR. VARNELL: Yes, your Honor. The -- the -- the notion that we haven't -- are you referring to B?

THE COURT: No. You -- yeah -- you were referring to me where Carroll was not listed.

MR. LUKAS: He's talking about a list.

THE COURT: Of managers.

MR. LUKAS: That's Plaintiffs' Exhibit Three. It's the list of managers whose mailboxes we did search. That's -- that's it. This is what you're talking about, isn't it, now?

THE COURT: To your motion to compel?

MS. SREY: It's actually Plaintiff's Exhibit Five, but --

MR. LUKAS: Oh, is it?

MS. SREY: -- if you want to bring it --

THE COURT: Plaintiff's Exhibit Number Five.

MS. SREY: Yes.

THE COURT: Oh, it's only off by two.

MR. VARNELL: Sorry, your Honor. There's a -- there's a lot of paper here.

THE COURT: Okay. Thank you very much.

MR. LUKAS: Here. This is it. This will be Five.

THE COURT: I mean, I -- okay.

MR. LUKAS: Ignore the "Exhibit Three" on the back because I guess that's wrong.

THE COURT: Anyway, I now have it.

MR. VARNELL: Okay. Well, I just wanted -- that's a point for the record, your Honor. That's no -- David Carroll's e-mail box was not one that we ever -- ever constructed.

But, your Honor, I want to -- I -- I guess I want to return to the more fundamental point, which is that we have declared and maintained the -- the privilege of -- of David Carroll's privileged communications all along, and for Mr. Lukas to sit here and say that we haven't produced any responsive or even non-privilege documents, that -- that's just incorrect, and one thing that -- and this goes to the exhibits that I -- that I have just presented to the Court, your Honor -- one month after taking Mr. Carroll's deposition, Plaintiffs served us with new discovery, and they were aware of the fact that they could -- you know, they had the

opportunity to take follow-up discovery related to what came out at Mr. Carroll's deposition, and they in fact did that, your Honor, and if the Court turns to Request Number Thirty-Five, you'll see that they asked for:

> "all documents relating to Defendant's lobbying efforts for changes to the Fair Labor Standards Act or the corresponding regulations as described in part by David Carroll in his deposition,"

and, your Honor, we -- we did in fact submit or produce our -- our responsive, non-privileged documents in response to this -- this request. We haven't been playing games.

There's -- there's dozens of documents here, and they're the -- the correspondence between David Carroll and -- and third parties that don't fall within the privilege. There's -- there's correspondence here between David Carroll and the Mortgage Bankers Association. There's correspondence involving the Chamber of Commerce. There's correspondence that he sent to various government officials, including John Conyers from -- from Detroit and -- and Candace Miller as well.

So we have, in fact, your Honor, produced the -- the responsive, non-privileged documents that -- that fall outside the privilege and that essentially answered or complied with -- with Plaintiffs' follow-up discovery requests.

Also, your Honor, if you turn to Request Numbers

Forty and Forty-One, that's where Plaintiffs asked for various e-mails. Forty asks for e-mails from Plaintiff; Forty-One asks for e-mails from essentially the defendants that they're asking for. They ask for e-mails from managers, and they also specifically mention Jay Farner, but they -- they -- they don't specific David Carroll, and that's again why he wasn't included on the -- the list of managers who we were putting e-mail boxes together for.

I guess, your Honor, if -- you know, one other point. I've already, I guess, in a sense touched upon it. We don't think there was a -- a waiver of privilege. We -- we -- we asserted the privilege at the beginning of this litigation. We've continued to -- to maintain it. We've produced documents that fall outside the privilege, but, your Honor, even -- and this, again, just assuming for -- for argument purposes -- if there was a waiver, Mr. Lukas is focusing on this -- this declaration that we provided. Nothing new came out of that declaration.

Again, Mr. Carroll was deposed back in February 2005, and the information that he provided there was the same information that he provided in his declaration. He -- he identified himself as the decision-maker when it came to how to classify mortgage bankers. He acknowledged that he consulted with his counsel, with Richard Chyette, the same way that he did in his declaration, without ever getting into the

content of that discussion. He -- he never did that at his declaration, but he -- he made clear at his deposition that he talked with Richard Chyette. He also described the steps that he took in his -- his decision-making process.

They can't claim surprise about that declaration. They had a chance to sit down for several hours with -- with Mr. Carroll, and they asked him questions about what he did as the -- as the decision-maker, and once that deposition concluded, they followed up with -- with this discovery, asking him about his lobbying efforts. That's what they were interested in. They -- they knew they had that right, and they -- they exercised that right, but they can't now come back three years later and basically take another run at this and say, you know, "We have a right to -- to pursue additional discovery there.

The issue of -- of waiver is valid, and whether they point to Rule 56(f) or Rule 37, both of those rules make clear that timeliness is -- is a factor and it's something that has to be reserved or -- or recognized.

THE COURT: Mr. Lukas?

MR. LUKAS: Mr. Carroll was produced as a 30(b)(6) witness. It's on page five of his deposition. I showed him the 30(b)(6) notice, asked him if he was prepared to answer questions on that topic, informed --

THE COURT: What was the topic? What was --

MR. LUKAS: It was -- it was Exhibit One. I don't think we gave you that, but it's job duties, who made the decision, all those things. It's like a twelve-point thing.

He was a 30(b)(6) witness, and throughout that deposition, whenever asked about who made the decision, it was he and Mr. Chyette, he and Mr. Chyette, he and Mr. Chyette, and this is after they've asserted the privilege in their discovery responses, and I did not invade that privilege.

They talk about lobbying efforts and -- and whatnot. They still today -- and -- and I want to make sure this is clear; it sounds like -- I -- I realize our emphasis on the e-mails may be misleading you. They have produced no documents, no summaries, no letters, no memos, no analysis, no NBA documents, no DOL documents, or e-mails that have anything to do with the classification decision. They have asserted the privilege as to the classification decision. That's what they asserted the privilege on, and now they're turning around and saying we know -- we knew we could have asked for it.

We did ask for it, and they asserted the privilege, and that's what we cited in our brief. Where we specifically asked for the decision-making, they asserted a privilege, and we've respected that privilege, and now we're being told we shouldn't have, we should have somehow known they were going to do this.

The other thing that's important that I -- that's

the other --

THE COURT: Wait a minute.

MR. LUKAS: -- that's one point I wanted to make. It's everything they withheld.

THE COURT: I thought -- I thought they produced Carroll as the person who made the decision as to the classification.

MR. LUKAS: He said he and Mr. Chyette made the decision. When you read the depo', he says over and over again that Mr. Chyette made the decision.

THE COURT: Okay. I want to get to that in a moment.

But assuming that -- during that deposition, were there questions as to whether he consulted with counsel -- other counsel?

MR. LUKAS: Your Honor, there's a part in this deposition where they instruct him not to answer, because I ask him about a conversation he had with Mr. Chyette. On page ninety-one, we're talking about their decision to -- to bring an ethics charge against Nichols, Kaster & Anderson. I'm asking him about that, and Mr. Perry says -- I say:

"Prior to bringing ethics charges, what did Mr. Chyette tell you about Mr. Jared had to say" [sic]?"

"MR. PERRY: Objection. Attorney-client

privilege. We'll stipulate that there were conversations, but the substance of those conversations are subject to the privilege."

They asserted the privilege during the depo', instructing him not to answer, with conversations regarding Mr. Chyette.

THE COURT: Okay. Mr. Varnell, how is it that he at his deposition was not saying, "I made the decision alone," but, "I made the decision in conjunction with Mr. Chyette," and it's clear that Mr. Chyette is playing the role of counsel for those places. Apparently there was an objection to it. Why is it that he is not basically saying that, "I did it based on the advice of Counsel Chyette because we made the decision jointly"? Why is that not similar to waiver, to -- to saying, "I'm basing my decision in part on advice of counsel that this was legal"?

Now, my bet is there's nothing that you're going to discover when you get to the bottom of this, if you get to the bottom of this, from Chyette that's going to be any different than -- than in the declaration from Carroll, but that's -- that's a -- a question to be answered, not a premise from which we should begin.

MR. VARNELL: Your Honor, at his deposition, David -- David Carroll made clear that he was the decision-maker -- again, pages sixty-three and page one-oh-three -- and he -- he

did testify that he talked with his -- his counsel, with his lawyer Mr. Chyette, but, your Honor, talking with -- talking with his counsel, receiving advice from counsel and acknowledging the fact that he received advice from counsel, that doesn't cross the threshold into what the content of that -- that advice was, and he makes clear that it was one component of the overall decision-making process that -- that he went through.

He -- he acknowledged the fact that he -- he looked at the statute, that he looked at the regs, that -- that he was aware of the Conseco case of various department opinion letters. He makes clear that that was -- that he -- that he underwent a -- a comprehensive examination of -- of-- of -- of the issue at hand.

But, your Honor, he also went out of his way to say that those were -- were informal conversations that he had with -- with Mr. Chyette. He -- he talks about the fact that they've got a long working relationship, and they did talk but it was -- it was informal. He -- he said that there were memos generated, that -- that kind of thing.

THE COURT: Okay. Okay. That may justify why there's no documentation of it, but it doesn't change it from whether or not he is saying, "I made the decision based upon the advice of counsel," and could the advice of counsel not been [sic] either whether or not the practice at the

defendant's organization was or -- was or was not congruent with the premises set out in Paul DeCamp's [ph. spelling] opinion letter?

MR. VARNELL: He did acknowledge, your Honor, that he -- that he talked with -- with counsel, that they had had discussions about the issue in terms of how to -- how to classify mortgage bankers and whether or not they were -- they were classified properly, but does that entitle Plaintiffs to David Carroll's files, the -- the full extent of them? I would respectfully submit it doesn't, your Honor.

He's produced the -- the responsive, non-privileged documents that he has. That's what's included in File Number Thirty-Five that I presented to the Court. The remainder of those documents are between Mr. Carroll and Mr. Chyette as -- as the lawyer and the client, and again, because they were informal discussions that he had, there aren't extensive files that he has available to produce, that he's -- he's produced what he has -- has that's -- that's responsive and non-privileged, and again, bottom line is -- and he made this clear in his -- his sworn testimony both at deposition and in his declaration -- he was the decision-maker. He makes that clear at the -- the very end of his deposition on page one-oh-three.

THE COURT: If -- if an individual who's not an attorney that works at a corporation is facing an issue of

willfulness and wishes to show good faith and lack of willfulness that there's been a violation and he says, "I made the decision based upon a number of factors, but I made the decision in conjunction with discussions with counsel," and then he states all the reasons for why the decision ought to be accepted as valid, basically, brief as the declaration of David Carroll basically is -- I'm not saying it's false; I'm not saying it's not what he -- the calculus that he said, but it -- but it looks like a legal brief, and he says, "I made this decision based in part on the advice of counsel to show that I acted in good faith and did due diligence," why is that not the same as saying, "I acted on advice of counsel," and that long declaration just had the signature of Chyette who -- or any outside counsel on it when that is the -- at least the purported justification that he in good faith relied upon?

MR. VARNELL: I guess the --

THE COURT: And then when we take this officer and turn him into an attorney also, it even gets more confusing.

MR. VARNELL: Your Honor, I guess the -- the sort of -- the -- the quick or the -- the straightforward answer is there's -- there's a big difference between disclosing the -- the content of those communications and just acknowledging the fact that he -- that he talked to his lawyer as -- as part of the decision that -- that he reached, and both the cases cited by Plaintiffs and Defendants -- the In re Lot [ph. spelling]

case and the Ross [ph. spelling] v. City of Memphis case -- those are Sixth Circuit decisions that say for there to be implicit waiver -- leaving aside whether you explicitly make the decision to -- to waive those communications, but for there to be implicit waiver, you've got to place the content of those conversations with your lawyer at issue, or you've got to disclose the -- the communication itself, and the -- the cases that -- that we cite and -- and Plaintiffs cite again, In re Lot and Ross v. City of Memphis, make that clear. That's -- that's what David Carroll's declaration did.

THE COURT: I have not and will read those cases, but let me -- let me pose a hypothetical to you. Assuming, which I think was this case, that you say in a declaration, "These are the reasons why I think that these employees qualify for the exemption, and I made this decision -- I was the decision-maker. I made this decision talking to people in Human Resources, based upon lots of communications I had with other people about what the mortgage bankers and the telephone banks did, and I also talked to and relied upon advice of counsel." Is that not an implication that what I have said in my declaration, that I received no information from counsel, is inconsistent with that? Is that not an inference?

This is in the nature of half-truths and fraud law, that when one makes a statement, there is an implicit, unstated statement included in every statement that you know

nothing of a material nature that's inconsistent with the assertion you make and -- and that if that turns out not to be true -- that is, if there's been a mental reservation or a -- selective ignorance on -- on certain information that you're disclosing, that that's treated as active fraud, why is that when a person says, "This is my reason why I think these jobs are exempt, and I made this in conjunction with an attorney, among other things," these are not implications that the attorney said nothing inconsistent with what's in my declaration?

MR. VARNELL: Your Honor, I would -- I would --

THE COURT: And therefore, if that is what -- what that ordinarily would imply -- otherwise why mention you also relied on advice of counsel --

MR. VARNELL: The --

THE COURT: -- because you can rely and disregard the advice of counsel is not the implication that that wouldn't help you with making an assertion in good faith, but why is that not the equivalent, as I say, of having the attorney ratify what's in that declaration and that's the advice of counsel, and why isn't that a waiver?

MR. VARNELL: Your Honor, I would say that the -- the declaration that -- that David Carroll submitted was to explain the various steps that he took. He had to apply the law as he understood it, and the point of his declaration was

to show that he arrived as a decision-maker at -- at his decision on how to classify mortgage bankers in a measured way, and --

THE COURT: He wanted to show and he wanted to get the advantage as part of his due diligence that he had relied on advice of counsel.

MR. VARNELL: That -- that's correct, your Honor. He did -- he did show in his declaration that he -- that he talked to his attorneys as part of the decision-making process, and I -- I would respectfully submit that that was the -- the smart, reasonable thing to do. These are complicated issues, and he turned to his lawyers to get their input, just as he looked at the -- the regulations and -- and the opinion law and talked to other -- or the opinion letters and talked to other people within -- within the industry.

But again, the purpose of the declaration was to show what his -- his decision-making process was, and that's really what is at the heart of the -- the recklessly disregarded or -- or lack of willfulness question. It's not whether or not he arrived at the right legal conclusion. It's -- it's did he take steps sufficient to inform himself of what the exempt status decision should have been, and he did do that, and his -- his declaration just makes that clear from a factual standpoint, the steps that he took.

THE COURT: And the case law you cite says that they

actually have to refer to the specific content of the communications lawyer before there's an actual waiver and identified as such, because I'm assuming that there's nothing that -- assuming again as an untested premise, because his -- his declaration is so thorough -- that I'm assuming that anything he told him was in that declaration -- that was helpful.

MR. VARNELL: He did -- he did go through a -- a -- a thorough examination, your Honor. He -- he -- he makes that clear in his declaration. He also makes that clear at his deposition. He says that he had ongoing and continuous communications with his counsel. He says they were informal. They weren't generating memos back and forth, but they've got a close working relationship, and they talked to each other about those issues all the time.

And again, he made that -- that point crystal clear to Mr. Lukas and -- and Plaintiffs' counsel all the way back in February 2005. The declaration doesn't shed any new light on that. Mr. Lukas even asked Mr. Carroll if he looked at various cases like the Conseco opinion or even the John -- John Alden case. He had -- he had those discussions with him. There's nothing -- nothing new in terms of what efforts Mr. Carroll came -- that came to light out of his declaration that -- that came -- that hadn't come to light three years ago.

THE COURT: I take it, Counsel, you did not screen any of Carroll's, and I take it you didn't screen Chyette's either as far as the screening process, because Chyette's also would have been just -- he was not also on this list, was he?

MR. VARNELL: He wasn't on the list of --

THE COURT: He wouldn't be because he --

MR. VARNELL: -- of managers, but he --

THE COURT: -- clearly general counsel --

MR. VARNELL: -- he was on the list of fourteen lawyers that were screened.

THE COURT: Lawyers, so --

MR. VARNELL: Correct.

THE COURT: -- so basically they were all screened out, so there's been no -- no review of it.

MR. LUKAS: Had we had this declaration, he certainly would have been one of the people's e-mails we would have been going through. That's the point, your Honor. I think you hit it on the head. You said everything that was helpful to Mr. Carroll you -- from the lawyers you assume is in the declaration. We get to know that there's something there that wasn't helpful for the declaration. That's the whole point.

And this whole argument that he's not a lawyer when he makes his -- he's a lawyer for some reasons at Quicken but not others, and when he's making the decision as to how to

classify these people under the legal standard of the FLSA, after reading this dec' with legal conclusion upon legal conclusion, you're to believe he's not a lawyer at that point? It just strains credibility, everything that's helpful.

And if he's not, okay, let's -- again, assume he's not a lawyer. Four places in that declaration says he consulted with legal counsel. We get to determine -- they don't get to just say -- they don't just get to take the good stuff and put it in there. We get to see it all.

And it's not just e-mails, Judge. We haven't gotten one document. He gave you some lobbying efforts. This hasn't -- this isn't an interrogatory request or a request for production regarding the decision -- classification decision. It's not. They didn't give us anything. We don't have one document related to the classification decision, and we don't because when we asked those questions, they asserted the privilege.

THE COURT: I take it at the deposition you went into the decision-making process for why they were exempt, similar to what's in the letter that they applied to their partial summary judgment motion.

MR. LUKAS: Every time I asked him about something, he said, "Me and Mr. Chyette," and I never went into anything with Mr. Chyette. I asked him, "What did you look at?" and he told me some of the things he looked at. He looked at

Conseco; he looked at John Alden. I didn't get into the analysis or anything with him.

And he said -- you read -- you read the deposition. He says -- every time he's talking about the classification, he keeps saying, "Mr. Chyette and I," "Mr. Chyette and I." It's -- well --

THE COURT: But did you not know that this was in the process of making the decision of whether or not they fell within the exemption area?

MR. LUKAS: Certainly, and that's why I didn't ask about what he talked to Mr. Chyette about, because it was privileged.

THE COURT: And -- and they're saying that they have maintained whatever Chyette's advice was was privileged and that Chyette's the lawyer in this and that he's the client.

MR. LUKAS: Well, first of all, he's a lawyer, but they haven't maintained it. They say over and over in the dec' that they consulted with Legal, and he says over and over in the depo' he consulted with Mr. Chyette, who's Legal. When we go to screen, they include him as Legal. They -- they produce a declaration that can be read as nothing but a legal brief from a lawyer who they're saying, "Well, he's wearing a different hat when he writes that dec' and makes that decision."

THE COURT: Where in the deposition you said did he

say that he and Chyette made the decision as opposed to he and Chyette consulted?

MR. LUKAS: Okay. Here we go. He and Chyette made the original decision -- it starts on page sixty --

THE COURT: Where is this attached?

MR. LUKAS: It is Exhibit A. Deposition of David Carroll, Exhibit A to Plaintiffs' brief.

THE COURT: Okay. What page?

MR. LUKAS: Page sixty, line thirteen.

(Brief pause in proceedings)

MR. LUKAS: And I can walk you right through the depo', Judge, in that between page sixty and page sixty-five, he says he and Mr. Chyette went through this five times. He says he "and Mr. Chyette."

(Pause continuing)

THE COURT: So he said the original decision was made by him and Chyette in '95 --

MR. LUKAS: Yep.

THE COURT: -- and '96.

MR. LUKAS: Yep. And then on page --

THE COURT: And then you --

MR. LUKAS: -- sixty-two he says they revisited it a number of times.

THE COURT: -- you -- you characterize that -- pardon me?

MR. LUKAS: And then on page sixty-two he says he -- he revisited the issue a number of times.

THE COURT: Well, yeah, but always --

MR. LUKAS: And on page sixty --

THE COURT: -- specifically in -- in the spring/summer of 2002 --

MR. LUKAS: Right, and then --

THE COURT: -- after the -- after the Conseco case --

MR. LUKAS: Right, and then he says on page sixty-three --

THE COURT: -- and, "That was occasion for Richard Chyette and I to revisit the issue."

MR. LUKAS: Exactly. Then again on sixty-four: "No formal review, for Richard Chyette and I have had a working relationship."

And then on the top of page sixty-five he says: "But we would -- those types of informal conversations would be pretty frequent between Rich and I over the years."

MR. VARNELL: But, your Honor, if I can point out, on page sixty-three he makes clear:

"No formal reviews, but Richard Chyette and I have a working relationship, and he would advise me of various happenings in the law."

And then at the very end of his deposition on page one-oh-three he states clearly:

"I would consult with him, and he'd continually provide me updates on the law, but ultimately the decision -- I made the decision" --

THE COURT: Where are you, now?

MR. VARNELL: That's on page one-oh-three, your Honor.

THE COURT: One-oh-three?

MR. VARNELL: In the middle:

"I would consult with him, and he'd continually provide" --

THE COURT: Let me -- let me get there. Let me get there before you start reading.

MR. VARNELL: I'm sorry.

(Pause in proceedings)

THE COURT: Mr. Lukas, that does seem to clarify that when he said he made the decision with Chyette, that he meant that he sought consultation with him, that he was the ultimate decision-maker, and I don't see anything that was prompting that. Obviously, his lawyer may be --

MR. LUKAS: That was his lawyer. Well -- well, the break in the hallway maybe.

THE COURT: Obviously, Carroll being a lawyer is -- he may not need prompting.

MR. LUKAS: But, your -- what -- I -- I guess I'm missing the point. He's saying right there he's consulting with a lawyer. He's consulting with a lawyer, but I don't get -- I don't ask what he said --

THE COURT: But what the defendants are saying, that -- that --

MR. LUKAS: -- or what he's doing.

THE COURT: What the defendants are saying, that when you say that, "I consulted with a lawyer in my decision-making process," that that does not waive the content of what the lawyer told him, and again I'm going to read these cases because I was telling you why I thought there was an implication --

MR. LUKAS: Yeah.

THE COURT: -- that there was nothing inconsistent said.

MR. LUKAS: It -- it is when you're waving it as a flag as part of your good faith effort, and when I -- and on page ninety-one when I got -- when I tripped into a conversation with Mr. Chyette, they shut it down: attorney-client privilege.

So I -- you'll read those cases. You'll see. They don't -- when -- when you in a willful situation cite as part of your good faith basis -- you cite as part of your good faith basis consultations with attorneys, we get to know what

that consultation was.

And if he's not a lawyer, Judge, where --

THE COURT: What case did you have -- you --

MR. LUKAS: We cited them. They're all in our brief.

THE COURT: Okay.

MR. LUKAS: And -- and, your Honor, the -- the -- the point is, if he's not a lawyer, where are all the other non-privileged documents concerning the classification decision? They have given us none.

He showed you lobbying efforts. That has nothing to do with the classification decision. Where are those documents if he's not a lawyer? They didn't give them to us because --

THE COURT: What -- what was the request for production on that?

MR. LUKAS: Absolutely, your Honor, and that's --

THE COURT: I said what was the request. I knew there was.

MR. LUKAS: It was Request Number Twenty-Five is the most specific.

MR. VARNELL: Thirty-five, your Honor.

THE COURT: Thirty-five?

MR. LUKAS: No.

MS. SREY: Are you --